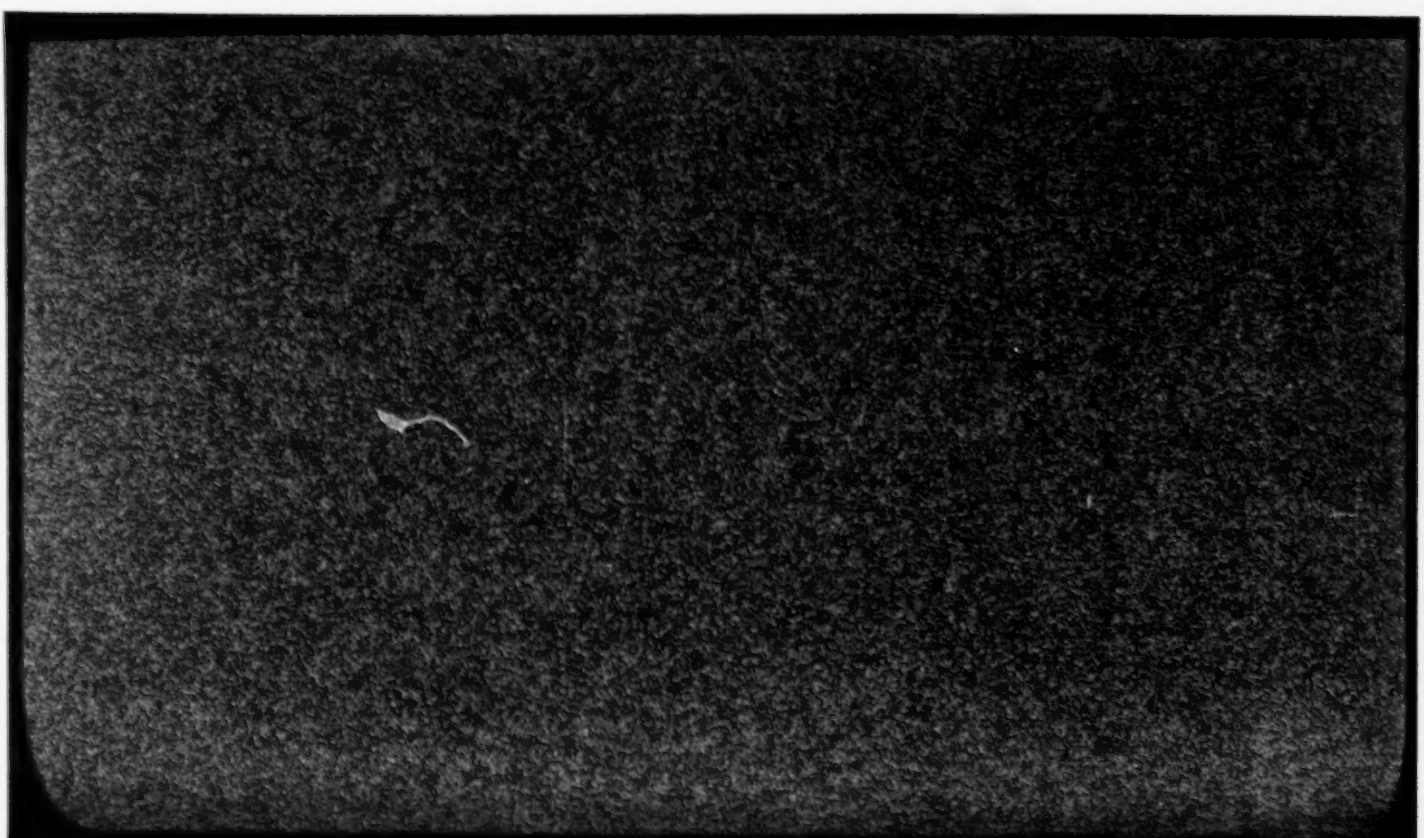

IN THE

Supreme Court of the United States

No. 1104

RAIL AND RIVER COAL COMPANY, *Appellant*,

v.

WALLACE D. YAPLE, *et al.*, *Appellees*.

MEMORANDUM OF APPELLEES, OPPOSING MOTION FOR RESTRAINING ORDER.

The general scope and purpose of the Ohio law the enforcement of which is sought to be suspended is the same as that of the Arkansas law, sustained in McLean v. Arkansas, 211 U. S., 539; that is, both laws alike seek to prevent the compensation of miners upon a weight basis other than according to what is known as the "run of the mine"; *i. e.*, the total weight of the contents of the mine car.

If there is any element of novelty in the instant case and if it is not ruled absolutely by McLean v.

Arkansas, such a result follows from the provisions of Sections 2 and 3 of the Ohio law. That is, unless it can be shown that the presence of these provisions in the Ohio law constitutes a further and unwarranted invasion of the liberty of contract, this case is ruled by the Arkansas case and there is no merit in the application for a temporary restraining order.

Our contentions with respect to the provisions of Sections 2 and 3 of the Ohio law are as follows:

1. They constitute appropriate and necessary incidents to the main object of the law.

2. Their effect cannot be complained of by the appellant and those whom it represents.

Section 2 of the law provides for a determination by the Industrial Commission of Ohio of the percentage of impurities *unavoidable* in the proper mining or loading of the contents of mine cars of coal in the several operating mines in the State of Ohio. The purpose of this provision will be adequately disclosed to the Court by a perusal of pages 51 to 58, inclusive, of the Report of the Ohio Coal Mining Commission, *a copy of which is filed herewith*, and further by reading the Commission's second conclusion and recommendation at page 59 thereof.

The proceedings and recommendations of the Commission conclusively show that in the mining fields in which the ordinary mine run system of compensation obtains its most unfortunate consequence is the incidental production of an undue proportion of impurities. The evidence before the Commission related particularly to the experience of Indiana,

Illinois and *Arkansas,* under the mine run system, and it is well established by that evidence that where operators and miners are left free to contract respecting the basis of rejection on account of impurities, the evil is not obviated. The only way in which the incidental detriment of the mine run system can be met is by some such means as is found embodied in Section 2 of the Ohio Act, *i. e.,* a legislative requirement that no impurities in excess of the *unavoidable minimum* be allowed to be mined. Coupled with the imposition upon an administrative tribunal of the duty to ascertain by impartial investigation what is for each mine the unavoidable percentage. If there is any other way in which the desired result can be obtained, it has not been suggested in previous arguments in this case.

We submit that if a State has the power to limit the right of private contract so as to require all agreements for compensation of miners based upon the weight of the product of the mine to be made according to the total weight of the contents of the car, it also possesses, as an incident to this right, the power further to limit (in a purely technical sense) the right of private contract so as effectively to cope with the evils otherwise incident to such legislation. Especially does this follow, when the experience of States lacking such incidental legislation demonstrates that the evils inevitably occur.

The evils intended to be remedied are real and substantial. The report of the Commission shows this, and we feel that we need not expend space upon this proposition.

We contend that the plaintiff in this case, and those whom it represents, viz.: the coal operators, have no just cause for complaint on constitutional grounds against Section 2 of the Act. It has been said in argument that the effect of this section is to deprive the operator of the right to determine the quality of the coal which he desires to produce in his mine so as to fit the conditions of his market. We submit that the section has no such effect. The claim of appellants here is based upon an evident misconception of the function of the Industrial Commission under Section 2. The Commission is not to establish an arbitrary standard of purity; it is to ascertain the unavoidable percentage of impurities which may be produced by proper mining therein. As well said by the Court below:

> "It must be presumed that the Industrial Commission will perform its official *duty* and fix a standard which will exclude all slate, sulphur, rock, dirt or other impurities except such as is *unavoidable. The operator, if given the unrestricted right of contract could do no more.*"

In other words, the operator can not complain that the Act deprives him of the right to protect himself against an excess of impurities by his own contracts, because it is the duty of the Commission to extend to him all protection which he could possibly secure for himself. On the other hand, the operators could not be heard to complain that the law prohibits them from so contracting as to permit the mining of coal

of a lower grade of purity than that prescribed by the standard of the Act, for to do so would be to invoke the protection of the Constitution for the perpetration of a fraud upon the public, viz.: the production of unnecessarily impure coal.

Furthermore, if the appellant and those whom it represents *fear* that the Commission's action will not go to the full extent required for their protection, *i. e.,* will not fix the minimum at what is *unavoidable,* such fears can not be made the ground of complaint under the Constitution; first, because, as pointed out by the Court below, "it must be presumed that the Industrial Commission will perform its official duty," and, second, as also pointed out by the lower Court, because "if dissatisfied with the Commission's order * * * he (the operator) may petition for and obtain a hearing before the Commission * * *, and may thereafter have a speedy review of its action by the Supreme Court of the State."

Act February 27. 1913, 103 O. L., 95, Sections 25, 27, 38-42; Article 4, Section 2, Ohio Con., as amended 1912.

These statutory and constitutional provisions emphasize the point that the Commission's function is in no sense legislative, but is purely administrative, consisting of the application of the standard fixed by the law itself to varying facts and circumstances. Under legislation, wherein the rights of the operator are so carefully safeguarded as they are by the provisions which we have cited no valid complaint of the kind which is here made can be urged.

Counsel for appellant claim that the right possessed by the operators under the Arkansas statute to accept or reject the mine car is taken away by the Ohio statute; and that this constitutes a controlling distinction between the McLean case and the case at bar. Of course, the right to reject is *qualified,* in that, presumably, the operator may not reject a carload which comes up to the Industrial Commission's specifications. But the right to reject when the product fails to conform to such specifications is preserved, at least by inference. And as already pointed out, the law requires the Industrial Commission to fix a standard of rejection as exacting as the operator could possibly fix it for himself. Therefore, the operator is not injured by having his right of rejection qualified in this technical sense. All that the law does is to fix by due process of law, wherein opportunity for judicial review is afforded, a *standard of rejection,* binding upon the employer but in no real sense injurious to him. The effect of having such a standard is to remove one opportunity for the perpetration by the operator of real or fancied frauds upon his operatives, and, thus, to do away with a possible cause of industrial warfare.

Coming now to Section 3, it is to be observed that the functions of the Industrial Commission are not invoked unless the operator and his employees have failed to agree upon the allowable percentage of fine coal. If agreement is made between employer and employee the terms of that agreement will doubtless fix the consequences of an overproduction of fine coal. If there be failure to agree, however, the Commis-

sion is to make as to this feature of the employment contract an order similar to that which we have already discussed respecting the unavoidable percentage of impurities. Though the order is but temporary in a sense, it may be enforced by all the sanctions underlying the enforcement of any order of the Commission. (See opinion of Court below.)

We may say as to Section 3 that its purpose is similar to that of Section 2, viz.: the obviation of *incidental* evils, which experience has demonstrated are likely to follow from the adoption of an unrestricted run of mine basis of compensation. (See Report of Commission, pp. 43 to 51, inclusive. 59.)

The production of an undue amount of fine coal, like the overproduction of impurities, constitutes in a sense an economic waste. That is to say, if either of these conditions are present, the quality of the product is very seriously impaired. Both public and private interests require safeguards against such conditions incidental to legislation compelling the choice of the run of mine basis of weight compensation.

We refer, in passing, to the fact that a companion law passed at the same session of the General Assembly at which the law attacked in the case at bar was passed, provides still further safeguards against the overproduction of fine coal. (See page 68 of Commission's Report, and 104 O. L., 161.)

We do not see how the conclusion can be escaped that the provisions of the Ohio law imposing certain duties and resultant powers upon the Industrial Commission of that State are not fairly, reasonably

and even necessarily incidental to the purposes of the Act. If they are such, then the power to pass a run of mine law implies the power *to provide safeguards against incidental evils.*

Interstate Commerce Commission v. Goodrich Trans. Co., 224 U. S., 192;
Flint v. Stove-Tracy, 219 U. S., 107;
McCulloch v. Maryland, 4th Wheat., 316.

These conclusions being established, it necessarily follows that the Ohio law differs in no essential particular from the Arkansas law involved in the McLean case, and that the case at bar is ruled by that decision.

We refer briefly to the question respecting penalties, only to say, however, that as we understand the recent decisions, such a question is not germane to an issue such as that tendered by the bill in this case. Furthermore, we submit that a minimum penalty of $300 for each separate offense is not an excessive one. The appellant avers in its bill that one day's violation will subject it to penalties aggregating $800,000. We point out that if the fine were $50 instead of $300, the aggregate would still be in excess of $130,000 for a single day's violation on the part of the appellant. The fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum. It also does not appear that the penalties provided by the Act are more

than sufficient to avoid clandestine frauds on the part of the operators as against the operatives.

The object of the present motion is, of course, to preserve the *status quo.* We desire to direct the Court's attention to what that status is. The affidavits on file, both those in support of and that in opposition to the motion, show the following conditions:

With the expiration of the agreement between the operators and the members of the United Mine Workers of America, covering the two-year period beginning in the spring of 1912, efforts were made to renew the wage scale agreement. The operators, or at least some of them, insist upon the screen coal basis of compensation; the miners refuse to accept any basis other than the run of mine. So long as this deadlock continues the mines in Ohio will be shut down. This Court will, we think, take judicial notice of the possible consequences of such a situation as disclosed by painful events recently occurring in West Virginia and Colorado.

The affidavit of John M. Roan shows what the attitude of the miners is, and how they are determined to agree upon no other basis than the run of mine, regardless of the outcome of this suit. In other words, they mean to secure for themselves what they regard as the benefits enjoyed by their fellow workmen in Illinois, Arkansas, and to some extent in Indiana, Pennsylvania and West Virginia.

On the other hand, the same affidavit discloses the willingness of the operators to agree upon a run of mine basis. The affidavits, when read together, will show clearly, we think, that it is only the present

existence of a temporary restraining order, and the hope that the same may be continued, that has led the operators to remain obdurate.

We feel very strongly then that if the temporary restraining order or interlocutory injunction should be issued out of this Court, its effect in Ohio might very well be calamitous.

Finally, we point out that the "irreparable injury" anticipated by the appellant and relied upon by it as a basis for injunction is greatly exaggerated. The expense *necessarily* incident to the adoption of the mine run basis by way of changes in the tipples, for example, seems to be greatly overstated. (See affidavit of John M. Roan.)

In conclusion, we call the Court's attention to the fact that we have filed herewith a copy of the Report of the Ohio Coal Mining Commission to the Governor of Ohio. We do this because the Commission's Report will, we feel, set forth in convenient form all the considerations moving the Legislature of Ohio to the enactment of the present law. Questions which may arise in the Court's mind relative to any feature of it may be answered by examination of this report. For the Court's convenience, we submit the following analysis of the report:

ANALYSIS OF REPORT OF COMMISSION.

The "Screen System" as having to do with the "Public Peace."

P. 36. A ground for "discontent."

P. 37. A cause of "disputes and bitter feeling between miners and operators."

P. 42. Is a "weapon" of the operators.

P. 58. Commission finds "inequitable."

P. 59. Commission says the "mine run" plan will allay discontent.

As to having to do with the "Prevention of Fraud."

P. 33. Change in size of mesh of screen.

P. 37 and 38. Purely arbitrary and gives operator an advantage.

P. 39. Fraud in dumping.

P. 39. Wear of screen and delay in replacing.

P. 41. The variation in the same in different mines as to purity and breakability.

P. 41. Operators sometimes encourage careless mining to the detriment of the miners.

As to having to do with "safety."

P. 25. The Commission finds a direct connection between the screen and safety.

P. 37. Tends to leave dust coal in the mine.

P. 19 and 22. Tends to prevent adoption of safer systems of mining.

As to having to do with "Conservation."

P. 14. There is a direct connection.

P. 19. Tends to waste the pillar coal.

P. 22. Tends to waste the pillar coal.

P. 41. Tends to waste the pillar coal.

P. 60. Tends to waste the pillar coal.

P. 37. Tends to make the miner leave the fine coal.

P. 60. Tends to make the miner leave the fine coal.

P. 50. Which fine coal is sometimes in so much demand that lump coal is crushed before use.

We do not present in this memorandum any view which we entertain respecting the questions raised by the appellant under the Ohio Constitution. The opinion of the Court below deals fully with these questions, as well as with all the other questions in the case. In that opinion will be found authorities other than those herein cited, upon the points which we have endeavored briefly to discuss.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio,
and Attorney for Appellees.
JAMES I. BOULGER,
CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel for Appellees.

No. 513

In the Supreme Court of the United States

October Term, 1914.

RAIL AND RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, MATTHEW B. HAMMOND and THOMAS J. DUFFY, as Members of and Constituting the Industrial Commission of Ohio,
Appellees.

BRIEF OF APPELLANT.

HOYT, DUSTIN KELLEY, McKEEHAN & ANDREWS,
Attorneys for Appellant.

A. C. DUSTIN,
HERMON A. KELLEY,
PAUL J. BICKEL,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

No. 1104.

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HERMON A. KELLEY,
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Of Counsel.

SUBJECT INDEX.

STATUTES AND CASES CITED.

No. 1104.

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Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal taken under Section 266 of the Judicial Code from an order of the District Court of the United States for the Northern District of Ohio, Eastern Division, denying appellant's application for an interlocutory injunction.

The suit was begun in the District Court by the filing of a bill to restrain the members of the industrial commission of Ohio from putting into effect the so-called "mine-run" or "anti-screen law", set forth in full hereinafter, and also printed on pages 12 and 15 of the record in this case.

The bill alleges the following facts: The plaintiff, a West Virginia corporation, is engaged in the mining business in Ohio, owning 32,000 acres of coal lands of

the value of more than $1,000,000.00, and employing upwards of 2,000 persons. In the State of Ohio there are about 600 coal mines, employing upwards of 45,000 persons; in the year 1913 36,000,000 tons of coal were produced; and upwards of $26,000,000.00 was paid in wages to said employes.

The defendants are the members of the industrial commission of Ohio and are vested with various powers, including that of enforcing the provisions of the mine-run law.

For many years mining has been conducted in this State in accordance with wage contracts covering periods of two years, entered into between the operators and the miners. A majority of the miners are members of the United Mine Workers of America, which is a powerful labor organization, and the contracts referred to were made on the part of the miners by representatives of this organization. The last contracts so made expired on April 1, 1914.

The wage contracts provided for the screening of coal and for payment of wages at a certain price per ton for "lump coal", by which is meant such coal as would pass over a screen, the bars of which are 1¼ inches apart.

The bill sets forth the provisions of the act which are objectionable and which will be hereinafter referred to. It alleges that these provisions are unreasonable, unnecessary and arbitrary, and wholly impracticable in the operations of mining, and that the act is unconstitutional for the reasons that it violates the 14th amendment of the United States constitution, in that it deprives the plaintiff and others similarly situated, of liberty and property without due process of law, and denies to them the equal protection of the law; that the

act is not within the police power or any other power of the State of Ohio and is in violation of the bill of rights of the constitution of Ohio; also that it delegates legislative authority to the industrial commission of Ohio in violation of the constitution of this State.

It is further alleged that the industrial commission of Ohio is about to put said act into effect, and that if such be done, immediate and irreparable injury and continuing wrong will necessarily be caused to the plaintiff, wherefore a writ of injunction should issue to restrain the defendants during the prosecution of this suit and permanently from enforcing said act.

No answer to the bill has been filed and the application for an interlocutory injunction was based upon the allegations of fact in the bill, which stand undisputed. The District Court denied the application and entered an order in accordance with such denial; this appeal is taken from that order. That the allegations in the bill make a proper case for the issuance of an interlocutory injunction, if the mine-run law is unconstitutional, has not been questioned.

MINE RUN LAW OF OHIO.

The statute which the appellants claim to be in violation of the constitutions of the United States and of Ohio, is reported in 104 Ohio Laws, 181. It is as follows:

(Senate Bill No. 3.)

AN ACT

To regulate the weighing of coal at the mines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted.

SECTION 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

SECTION 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the pro-

duction of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission.

SECTION 4. Said industrial commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof.

SECTION 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

SECTION 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

SECTION 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt, or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the

system known as docking, on account of such slate, sulphur, rock, dirt or other impurity.

C. L. SWAIN,
Speaker of the House of Representatives.

W. A. GREENLUND,
President of the Senate.

Concurred February 5th, 1914.
Approved February 17th, 1914.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State February 20th, 1914. 36 G.

ERRORS COMPLAINED OF.

The appellants claim that the District Court erred in denying the plaintiff's application for an interlocutory injunction, which should have been issued, for the reasons set forth in full in the assignment of errors (Record, p. 25), which in the main are as follows:

1. That the law in question violates Section 1 of the 14th amendment to the constitution of the United States in that it deprives the plaintiff of liberty and property without due process of law; it constitutes an unwarranted and arbitrary interference with plaintiff's right to contract with its employes and to manage its business of mining, producing and selling coal, according to its own judgment; it delegates to the industrial commission of Ohio the power to determine the quality of coal to be produced.

2. That the penalties provided in said act for a violation thereof are so excessive and arbitrary as to deny to plaintiff and others similarly situated, the equal protection of the laws, in violation of the said 14th amendment.

3. Said act violates Sections 1 and 16 of Article I of the constitution of Ohio.

ARGUMENT.

I.

THE MINE RUN LAW IN ITS REGULATION OF THE BUSINESS OF COAL MINING DEPRIVES THE APPELLANT AND OTHERS SIMILARLY SITUATED OF LIBERTY OF CONTRACT AND OF PROPERTY WITHOUT DUE PROCESS OF LAW. IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The law applies to all coal mines in the State where miners and loaders are paid for their labor on the basis of the ton or other weight of coal. As this is the prevailing method of making compensation in this State, all of the operators, miners and loaders are affected by the law.

The law requires in the first instance that miners and loaders, who are paid by weight, be paid on a "mine-run" basis, that is, according to the total weight of all the coal contained in the cars in which it is brought up from the mine. The operator is prohibited from screening the coal for the purpose of ascertaining the amount to be paid such miner or loader for his labor on the basis of a diminished quantity of the coal. A violation of this prohibition is made a misdemeanor punishable by a fine of not less than $300.00 nor more than $600.00 for each separate offense.

In addition to the provisions establishing the mine-run system of payment there are added others which regulate the business of producing coal in a manner never heretofore attempted. These regulatory features deprive the operators of liberty of contract with respect to the quality of coal to be produced and the manner of its production. The appellant claims that these regulations

are in derogation of its constitutional rights. The features of the law in question are as follows:

First: The power of determining the quality of coal which the operator will produce is taken from the operators and may not be the subject of contract between them and their employes. This power is lodged in the industrial commission of Ohio, which is a state board appointed by the governor.

The law requires this commission to ascertain and determine the percentage of slate, dirt or other impurities "unavoidable in the proper mining or loading of the contents of mine cars of coal" in the various mines of the state, and **the operator is required to accept and pay for every car of coal sent up by the miner or loader, which conforms to the standard so fixed by the commission, whether the same is suitable for his needs or not.**

Second: It is made the duty of the operators and employes to "agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed." And, in the event of disagreement between the operator and any employe, or of non-agreement, the industrial commission, upon the request of any miner, loader or operator shall "fix such allowable percentage of fine coal" which shall remain in force until otherwise agreed to by the parties.

Third: Whenever the commission finds that the total output of fine coal for a period of a month exceeds the percentage which has been fixed by it, the commission is required to make and enforce such orders "relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission."

The effect of the above provisions is to take from the operator the right to determine the kind of coal he wishes to mine and to make contracts for its production, and to require him to pay for a product irrespective of the requirements of his trade.

Coal is a natural product deposited under ground, between strata of rock or slate, the coal seam often containing slate or dirt. It is removed from place by digging and blasting. Manifestly, the purity of the coal loaded depends upon the care exercised in the work of digging, blasting and loading. The importance of the control of this matter by the operator cannot be overstated.

The amount of impurities allowable in the output of the mine are by this law to be fixed by the commission on the basis of their ideas as to what is "proper mining." Like all other producers of material the coal operator has his ideas of quality required for his trade, which he must satisfy or go out of business. The act in question delegates to a state commission not responsible to him, the power of determining what is proper mining and of fixing the quality of his product on that basis. This is a very important regulation of the operator's business and an invasion of his right to manage his business as he thinks best.

The degree of purity which the coal shall have is removed from the realm of private and voluntary contract and transferred to the industrial commission. Instead of a voluntary contract between the parties entered into after the operator has considered the needs of his market, the formations of coal in his mine, the best methods of mining, as shown by his experience, and any other considerations which appeal to his business judgment,—there will be a contract thrust upon the parties by the

commission in accordance with its ideas of "proper mining," which will result in a finding by them of the percentage of impurities unavoidable in such mining. The operator must accept and pay for every car of coal which conforms to such standard, regardless of the standard which he would fix for himself and regardless of his knowledge or ideas with respect to the permanent or transitory needs of the market and regardless of his own ideas as to what constitutes proper mining.

The same considerations are applicable to the provisions covering the determination of the percentage of fine coal "allowable in the output of the mine." The fact that the commission acts on this subject only in the event of failure of the employer and the miner to agree, or in the event of non-agreement, does not affect the situation. In the event of such disagreement or non-agreement, a contract is imposed upon the parties by a body which represents neither. After the determination is made by the commission, the operations of mining will go forward, not pursuant to a voluntary contract entered into between the parties, but pursuant to an enforced agreement beyond the control of either party. It is just as much a deprivation of the freedom of contract where a contract is imposed upon the parties in the event that they fail tc agree, as where the contract is so imposed without giving them any opportunity to agree in the first place.

In order to make effective the standard of fine coal determined by the commission to be allowable in the output of the mine, it is given the power to make orders relative to the production of coal at the mine so that there after coal will be produced in such a manner as to reduce the percentage of such fine coal to the amount so fixed by the commission.

The interference with the operators' business does not, therefore, stop at regulating the quality of the product to be taken from his mine and depriving him of the freedom of contract in the premises, but includes the far reaching power to **regulate the methods of production.**

The act does not require that the commission, in issuing orders relative to the production of coal, shall take into consideration the most economical methods of mining, the needs of the market and the needs of the operators' business in general, nor many other considerations which would govern the operator himself, if left free to conduct his own business. On the other hand, the power of the commission is plenary to regulate the production of coal to the object and end that the percentage of fine coal fixed by it, shall be made effective.

We claim that it is not within the legislative power to enact these provisions and thus to regulate the operators' business, and that they are wholly unreasonable and arbitrary.

While there is a suggestion in the opinion of the District Court that corporations engaged in coal mining belong to the class of "public service corporations" which are subject to regulation by the government as such, we submit that this is unsound. **Coal lands and the coal thereunder are private property.** There is no distinction between coal mining and the mining of other minerals such as gold, copper, iron, etc., nor is the business different in principle from the pursuits of agriculture, stock-raising, lumbering and the like. These lines of business have never been regulated by government, but they always have been conducted by those engaged therein with perfect freedom, subject only to such restrictions as have been imposed in the interest of public health, welfare, etc. No claim has been made heretofore that the legisla-

ture could regulate such lines of pursuit on any other theory. The law on this point has been well stated by the Supreme Court of Illinois in Millett v. People, 117 Ill., 294, as follows:

> "The main reliance of the counsel representing the State, to sustain the ruling below, seems however, to be on the ground that mining for coal is affected with a public use, so that it may be regulated by law, like public warehouses, as held in Munn v. Illinois, 94 U. S., 113. It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of innkeepers, common carriers, millers, etc.; and in our opinion it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligations to obtain a license from any public authority, and therefore when he chooses to mine his coal he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public."

In view of the foregoing, the considerations which, in the case of German Alliance Ins. Co. v. Lewis, 233 U. S., 389, moved this court to hold that the business of fire insurance is affected with a public use, do not exist here. The court on page 415 says:

> "But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every

article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.' "

It is to be noted that the opinion in this case expressly limits the holding to fire insurance legislation.

That the right to choose one's business and to make any lawful contracts in respect thereto are property within the protection of the fourteenth amendment to the constitution of the United States will not be denied (Slaughter-House cases, 16 Wall., 37; Allgeyer v. Louisiana, 165 U. S., 578; Adair v. United States, 208 U. S., 161, 172).

Freedom of contract, protected by the fourteenth amendment to the constitution of the United States, is not, however, absolute, even when the business is a private business, but is subject to limitations lawfully enacted under what we know as the police power. The limits of the police power cannot be marked with precision. The authorities, however, establish the proposition that a law which interferes with private property, or which takes property or denies or restricts freedom of contract, must, **in order to come within the scope of the police power, bear some substantial relation to the public peace, safety, health, morals or welfare of the community and must not be arbitrary or unreasonable.** When a statute does not comply with these conditions, it constitutes the taking of property without due process of law. Adair

v. United States, 208 U. S., 161; Minnesota v. Barber, 136 U. S., 313; Holden v. Hardy, 169 U. S., 366; Welch v. Swasey, 214 U. S., 91; Smith v. Texas, 233 U. S., 630.

In Welch v. Swasey, supra, Justice Peckham clearly states this rule on page 105:

> "The statutes * * * must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. **If the means employed, pursuant to the statute, have no real, substantial relation, to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity.**"

In Adair v. United States, supra, the court said on page 173:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the Federal constitution. Allgeyer v. Louisiana, 165 U. S., 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the fourteenth amendment was not designed

to interefere. Mugler v. Kansas, 123 U. S., 623; In re Kemmler, 136 U. S., 436; Crowley v. Christensen, 137 U. S., 86; In re Converse, 137 U. S., 624 * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

There are numerous cases in which laws intended to preserve the public health, safety, morals or welfare were upheld on the grounds that it did not appear that the laws were arbitrary, unreasonable or did not sustain a substantial relation toward the object sought. It will not be profitable to examine these cases at length, inasmuch as the general rule is clear. We may, however, profitably quote the language of Justice Holmes in Hudson Water Co. v. McCarter, 209 U. S., 349, 355, wherein he said:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without com-

pensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point."

None of the cases go to the extent that a private business may be so regulated by the government as to give the government substantial control of the operation of the business; they merely allow such necessary abridgment of the freedom of contract and of dealing with property as the public health, safety or welfare require.

We will now examine the act under consideration, and see whether it encroaches upon the freedom of contract in an arbitrary, unreasonable and unnecessary manner. And first let us examine and distinguish the case in this Court, namely, McLean v. Arkansas, 211 U. S., 539, where this court upheld the Arkansas mine-run law, which is claimed to be decisive of the case at bar. We contend that the law there sustained is totally different from the Ohio law. The statute there prohibited the operator from screening coal before the total output mined by the miner had been weighed and duly credited to him.

This law was considered and sustained by the Supreme Court of Arkansas in 81 Ark., 304. That court said:

"The operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miner. The coal

'shall be accepted or rejected,' but 'if accepted' then it 'shall be weighed in accordance with the provisions of the act.'

The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded."

On a writ of error to this court, the holding of the Arkansas court was sustained. Justice Day, in his opinion, referred to a federal investigation of the conditions of labor in the mining industry, in which testimony had been taken, tending to show that frequently differences had arisen between the miners and the employers because of the disarrangement of the bars of the screen, where the screened coal system was in use, so that larger coal would go through the screen than the contract between the parties contemplated, thereby preventing a correct measurement of the coal and defrauding the miner of a part of his wages. He held that the law had been enacted to prevent this fraud and to secure more harmonious relations between the miners and their employers which had been disturbed by the fraudulent practices. On p. 550 he said:

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts."

He, however, called particular attention to the fact which had been emphasized by the Supreme Court of Arkansas, that this law expressly reserved to the operator the right to reject or accept coal sent to the surface by the miner. He said on page 548:

> "It does not prevent the operator from rejecting coal if improperly or negligently mined and shown to be unduly mingled with dirt or refuse."

The McLean decision represents the farthest limits to which this Court has gone to sustain legislation of the character in question. The difference between the Arkansas act and the Ohio act is very marked in the matter above pointed out.

The Arkansas act gives the operator complete freedom to reject and refuse to pay for the mining of any and all coal which comes to the surface which is not of the kind suitable for his purposes and market. The Ohio act, on the contrary, gives to the operator no option, but requires him to accept and pay for all coal sent to the surface by his miners, irrespective of whether suitable to his trade or not, so long as it conforms to the standards of purity and fineness which the commission has seen fit to establish.

It was obviously this liberty which the Arkansas statute left to the operator to deal with his own property as the demands of his trade should require, which was a fundamental consideration leading both the Supreme Court of Arkansas and the Supreme Court of the United States to sustain the exercise of legislative power involved in the act there in question; and the distinction between a statute which leaves the operator full liberty to reject and refuse to pay for the mining of a product, which he considers unsuitable to his needs, and a statute which leaves him no such liberty, but delegates to a public commission the power of determining what kind of product he shall accept and pay for, entirely irrespective of those needs, is certainly vital.

One of the principal questions now presented, therefore, is whether a statute which restricts the right of the

owner of property to such an extent as to require him to take and pay for material which he does not want and perhaps cannot use, is a reasonable exercise of the police power. Certainly such a statute is not sustained by the principles announced by this Court in the McLean case. Can it be sustained upon any recognized principle as a reasonable exercise of legislative power, or must it be condemned as arbitrary, unreasonable or unnecessary?

First let us see what is meant by the words "arbitrary, unreasonable or unnecessary" as used in the cases. We are not aided by any attempt at definition in the cases reported. We must deduce their meaning from the cases decided, where laws have been sustained or annulled as arbitrary, unreasonable or unnecessary under the peculiar circumstances involved. Each case depends on its own facts. A provision in the law is "arbitrary, unreasonable or unnecessary" where the end sought is not a proper one for legislation, or where the provision bears no substantial relation to that object, or deprives a party of a substantial right in some way wholly unnecessary to the end sought, or in an arbitrary or unreasonable manner.

That the right of determining the quality of coal that he needs in his business is vital to the operator's success, cannot be denied. That he should be left free to contract for such quality with his employes and be able to control them in its production is equally vital.

The bill avers (paragraph 17, section 5, Rec. pp. 7 and 8) that the proposed plan of control and supervision by the industrial commission is arbitrary, unreasonable and wholly impracticable in the daily business operations of mining. It must be assumed here that on the hearing upon the merits, evidence will be offered to sustain these averments. Suppose it is made to appear that there is no

practical means of determining the percentage of fine coal "allowable in the output" or of impurities "unavoidable in proper mining;" and further, that if any percentage of allowable impurities is fixed, that there is no practicable means of ascertaining whether a given car of coal complies or fails to comply with such requirement, and that the operator must guess at his peril what the fact is. Then clearly the arbitrary and unnecessary character of this provision would avoid the act.

Certain of these matters are so obvious that the Court will be able to apply them to the present situation without proof. The standard set up by the statute for determining the amount of impurities depends upon the commission's conception of what amount of impurities are unavoidable, which in practice may differ in every mine, in every room of the same mine and indeed in every car of coal mined; it depends upon the commission's conception of what constitutes "proper mining," when it is well known that there are many standards and kinds of mining which are regarded as proper, and that each of these several standards and kinds of mining results in producing different percentages of fine coal and impurities; and worse than all this, it requires that the commission shall determine a standard of fineness and purity for all coal taken out of a given mine, without knowledge of the particular requirements of the mine owner at that time. It is clear, therefore, that what is "allowable" and what is "unavoidable" in proper mining is a matter depending upon constantly varying circumstances and a matter upon which no two men may agree. Each operator has his own ideas on this point, and the law substitutes for such ideas those of the commission. The basis of the commission's findings being speculative, the results arrived at will be worthless and

without relation to the end for which they are to be used.

When it comes to the application by the operator of the commission's judgment in these matters, it is also apparent that it will be practically impossible to determine the amount of impurities contained in any given car of coal. No method of measuring impurities has been suggested either in the course of the argument below or in the report of the Ohio Coal Mining Commission. That report concerns itself solely with the advantages and disadvantages of the mine-run system, as such, but throws no light upon and discloses no consideration of the practical application of the regulatory features to which we are objecting.

In coal mining, as heretofore practiced, as coal comes to the surface it is possible for the representative of the operator on the tipple to determine roughly from such superficial inspection as is there practicable, whether it is sufficiently free from impurities to meet the requirements of the market, and the inspector may, and oftentimes does, doubtless pass cars containing an excess of impurities, knowing that the general run of the coal on the dump will be sufficiently pure for the purposes of the market. This is necessarily a rough "rule of thumb" method of passing the product, which answers the practical purposes of the mine owner.

But when a commission is authorized by statute to fix a definite percentage of impurity below which the product must not fall, and on the one hand, requires the operator to accept and pay for all coal above that standard, and on the other, subjects the miner to a penalty for all coal mined that falls below it, the "rule of thumb" is no longer applicable. Men cannot be punished by the courts for failure to comply with a standard which can

only be applied by guess, nor is there any other practicable means of measuring impurities. The contents of each car cannot be overhauled; such a requirement would put a stop to mining and in any event would result in no definite determination of percentages. There is no feasible method of separating impurities after the mine car is loaded. This cannot be accomplished by screening, for some of the impurities being large would pass over the screen, while fine dirt would pass through. It would be obviously impracticable, from the operating standpoint, to pick out the impurities by hand and weigh them.

The difficulties of applying a standard to the quality of coal mined is, moreover, immensely increased by the fact that each car must be tested by itself in order to determine whether the individual miner who produced it has complied with the legal requirements.

The plaintiff employs over 2,000 persons, and produces over 2,800 cars of coal per day. It would be wholly impracticable, even if possible, to ascertain whether every car complied with a given allowable percentage of impurities or not. The result is that the operator would have to guess at his peril what the percentage is.

But this is not all: what possible good can be derived from an ascertainment of the allowable percentage of impurities for each mine in the state, and whether every car of coal conforms to such percentage? What advantage results to the public, or the employe, or the employer from imposing this regulation upon the operator, which results in depriving him of the freedom of contract, of control over his business, and even if practicable, would necessarily cause a great deal of expense? The act requires the commission to make a determination for each separate mine in the state, and there may be as many de-

terminations and, therefore, as many standards as there are mines.

The salability of coal and the standard thereof required for the general market do not depend upon particular conditions in a given mine. The purpose and operation of the act, therefore, is not to fix a standard of purity which would take into account marketability. In other words, the standard arrived at by the commission must often be a standard quite different from that which the operator must apply in his business. We do not think that the legislature may either by law or commission, constitutionally fix a standard of quality which the owner of a coal mine must produce, or for which he must pay his miners, but if such standard is to be fixed, it should certainly bear some necessary relation to the marketability of his product. It should, in any event, not be a standard which serves no useful purpose to anybody, but imposes an arbitrary and utterly unnecessary burden on the operator.

It has been suggested by the defendants, and also by the Court below, that the determination of the commission on this point does not prevent the operator from coaling the coal before sending it to market. But this only emphasizes the uselessness of the determination of the commission. If the commission, basing its findings upon "proper mining" in a particular mine, fixes a higher standard than the market requires, then an unreasonable and unnecessary burden and expense is imposed upon both the miner and the operator. If the standard is lower than the market will permit, the additional expense of cleaning the coal and taking out impurities (which should have been taken out in the mine) to fit the coal for the market, is likewise an unreasonable and unnecessary expense to the operator. If the determination of the com-

mission accords with the needs of the market, it will be by accident and not by design, since the commission will be guided by what is "proper mining," in view of the peculiar conditions of each mine, and not by the demands of the coal trade, which do not depend upon the local conditions in any mine.

As we have shown above, an interference with the use of property and with the freedom of contract may be justified in the interest of the public welfare, where the means are reasonable and have a proper relation to a proper end.

But this is not such a case; neither the welfare of the public, nor of any member thereof is advanced by the burdensome and wholly impracticable and useless determination of the industrial commission. That determination is unreasonable, arbitrary and unnecessary for the following reasons:

1. The percentage of impurities, depending upon a consideration of what is "unavoidable in proper mining," cannot be definitely ascertained, but must always be a mere matter of opinion based upon circumstances varying in each mine and even in parts of the same mine.

2. No practicable means exists, or can be suggested, for determining whether a car of coal conforms to any percentage requirement.

3. The determination of the commission with respect to each mine and the application thereof to each car of coal will be useless, and will occasion large expense with no compensating benefit to the public, the operator or the miner.

4. The introduction of a percentage system will cause nothing but discord and trouble. Under the law in question he is told in advance that he may load a certain

percentage of impurities, and necessarily a controversy will arise whenever a car looks as though it may exceed the standard fixed by the commission.

It is urged that these features in the act are merely incidental to its main purpose; that they are intended to prevent some of the evils to the operator, due to the installation of the mine-run system; that the employe under that system might be tempted to send up from the mine coal containing too much impurity, or too much fine coal. If, however, the purpose of the regulatory features is to prevent this evil, and thus protect the operator, then the means employed have absolutely no relation to the end, for, as we have shown above, the impurities may still be too great for the operator's business, because the determinations of the commission will not be based upon the demands of the coal trade.

The supposition is also indulged in that these regulatory features are necessary to protect the operator against the evils of sending up too much dirt and fine coal, which must mean that the operator is unable to contract with his employe for the kind of coal he wants, or, that if he can make such contracts, he will be unable to protect himself from violation of the same.

It is urged that, therefore, the **state** must step in and take away the right to contract freely on this subject, and that the **state must make the contract** for the parties itself, and require the observance thereof insofar as the impurities are concerned by criminal penalties, and insofar as the fine coal is concerned by regulating the methods of production.

Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts? The cases that sustain the regulation by law of the method of paying

employes, the hours of labor, etc., taking from parties concerned freedom of contract in that regard, are all sustained on the theory of the protection of the weaker party against imposition by the stronger. They are all founded upon a supposed inequality of position of the parties to the contract. In such cases the state is permitted, under certain circumstances to legislate for the protection of the dependent party against unwise contracts and to abridge the otherwise absolute freedom of contract. Knoxville Iron Co. v. Harbison, 183 U. S., 13; Holden v. Hardy, 169 U. S., 366, 395; Muller v. Oregon, 208 U. S., 412; R. R. Co. v. Williams, 233 U. S., 685.

But further, the provisions in this act under discussion, so far from protecting the operator against unwise contracts, subject him to drastic burdens and measures entirely beyond his control. His right heretofore existing to determine for himself the quality of the coal to be mined and for which he shall pay is taken away, and he is required to accept and pay for a product which he does not want, regardless of his needs and regardless of the amount of fine coal contained in a mine car, and he can reject and refuse to pay for the same in only a single contingency, namely, when it contains more impurities than the commission has fixed. In all other cases he must accept and pay for the product. The determinations of the commission are entirely beyond his control, and both by the terms of the act and in the very nature of the case, are based upon considerations different from those which would govern the operator if left to conduct his business according to his own judgment. Could anything be less of a benefit and protection to the operator and more of a usless burden than to have the quality of the product of his mine to be determined by anyone other than himself; to require him to pay for a product

which may be different from that which the coal trade demands; and to subject him to the expense, which otherwise would be unnecessary, of fitting such coal for the market? How can it be urged that these provisions in the law are incidental to its purpose and intended to protect the operator from imposition on the part of his employe? How is anyone benefited by these burdensome regulations? We think it clear that neither the public in general, nor the employe, nor the operator can derive any benefit whatsoever from these regulations. If this is so, then it was not within the police power of the state to enact them.

We submit, therefore, that the regulations and burdens imposed by this act heretofore set forth, not only are wholly impracticable in operation, but that they have no reasonable connection with the purpose of the law and serve no useful purpose whatever, but are wholly arbitrary and unreasonable; and that they therefore constitute an unwarranted interference with the liberty of contract and the use of property.

It will be urged that it must be presumed that the industrial commission will act in good faith in the performance of its official duty. Whether the commission will determine the quality of the product better or worse than the operator is immaterial; **the constitutional right of the operator to regulate his own business, according to his own judgment, and to make contracts freely in connection therewith, is nevertheless taken away.**

The Court below suggests that the commission merely will fix a standard which will exclude all impurities, except such as are unavoidable, and that the operator, if given the unrestricted right of contract, could do no more. This position is unsound. The quality of coal that an operator may need for his customers may be such

as can be produced only by extraordinary mining methods, and he has a right to employ those methods, notwithstanding the ideas of the commission as to what may constitute "proper mining."

We rest this branch of the case on the proposition that the operator has the constitutional right to determine for himself the quality of the product which he requires, and for which he shall pay, and to make voluntary contracts to that end.

With respect to the amount of fine coal allowable in the output of the mine, it is no answer to say that the commission acts only in the event that the parties are unable to agree, for, after the commission has made a finding on this point, the mining will not be conducted pursuant to a voluntary contract, but pursuant to an enforced arrangement determined by the commission. The liberty of contract and the right to produce what one desires from one's property is nevertheless taken away. The constitutionality of the act must be determined, not by what has been or will necessarily be done under it, but by what may under its authority be done. Eubank v. Richmond, 226 U. S, 137. 144; St. Germain Irrigating Company v. Hawthorne Ditch Company, 143 N. W. 124, 127; Sterritt v. Young, 14 Wyo. 146.

Nor it is an answer to our objection to the law to say that the orders and findings of the industrial commission are reviewable in the state courts. The establishment by the commission of a percentage of impurities so high as to make the coal unmarketable might shut down the mines during the court review, with losses that would be irreparable. If the power of the state does not extend to such a regulation then the lack of that power is not supplied by providing for a court review.

If this law can be sustained, like regulation of other lines of industry is proper. A state commission may be given the power to determine the kind of vegetables or grain a farmer should raise, because in raising certain prohibited kinds, the farmer's employes do not receive just compensation. The state may regulate the kind of articles which a wholesale house should deal in, if it be represented to the legislature that in selling certain kinds of commodities, the salesmen do not receive in full the compensation they have contracted for. Suppose also, it should be represented that tailors, plumbers and other laborers doing piece work were partly defrauded by their employers in calculating the amount of their compensation, it would be justifiable for the state to determine for the parties what kind of articles they might produce upon which the compensation should be calculated. There would seem to be no limit to the power of the legislature, if cases like these are held to justify such state control.

In conclusion on this subject, we incorporate herein the following warnings against those subtle inroads against these constitutional rights, which seem to be gaining in our courts. In R. R. Co. v. Ellis, 165 U. S. 150, 153, Justice Brewer says, quoting from 116 U. S. 616, 635:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound that in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Justice O'Brien in People v. Williams, 189 N. Y. 131, 135, says:

> "The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort and health of the community, and that a wide range in the exercise of the police power of the State should be conceded, I do not deny; but, when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked, to protect against legislative acts plainly transcending the powers conferred by the Constitution upon the legislative body."

Opinion of the District Court as to the Police Power.

The Court below considered this law to be within the police power of the state, relying upon the McLean and other cases cited. We need add nothing to what we have already said as to the general scope of that power, but we again call attention to the fundamental difference heretofore pointed out between the statute sustained in the McLean case and the Ohio act,—a difference which the Court below does not appear to have considered.

In the McLean case the Court went to the extreme limit that has thus far been reached in sustaining the exercise of the police power for the purpose of protecting the interests of the employed, and in reaching that limit this Court was not unanimous. It was there held that the right of the employee to contract

with his employer was not denied or unduly restricted by requiring him to pay for the mining of coal sent to the surface without putting it over the screen, **because he could avoid paying for it altogether by rejecting it.** Obviously this right of rejection, under the Arkansas act, was unlimited. Under that act the mine owner was not only at liberty to reject coal sent up by his miners because it contained too much fine coal or too many impurities, but he could even reject it arbitrarily. With this liberty thus left him, the majority of the Court very properly thought that the statute did not deprive him of his right to deal with his men and his property as his requirements might suggest.

Turn now to the Ohio act, which leaves the owner of a mine no option whatever as to the fineness or purity of the coal he shall produce. It requires that he shall pay his men for the coal they may send to the surface without screening it, and without any reference to whether the coal will in his judgment answer the requirements of his trade. It substitutes the judgment of the commission for the judgment of the property owner as to what coal he must accept and pay for, and in making this substitution it does not even provide that the commission shall take into account the market requirements of the mine owner, but seems to contemplate that the commission's judgment shall be based upon wholly different considerations, such as what is "allowable" or "unavoidable" in the process of mining. We submit that such an extension of the police powers of the state is not only not contemplated by the Court in the McLean case, but that it has never been entertained by any court. It may be difficult to define the precise boundaries of the police power, but here there can be no question of precise boundaries. The Ohio act, by depriving the owner of

private property of all control of the question what he shall produce from it, goes so far beyond any boundary thus far suggested or attempted, that nice definitions of the police power become unnecessary and superfluous.

In addition to other supposed purposes of the act already discussed, the Court below seemed to consider it as possibly promotive of the safety of the miners while at work, by preventing the undue accumulation of fine coal. It may well be doubted whether any such purpose would be promoted by the statute. There was already on the statute books of Ohio a law which required, under penalty, the removal of all fine coal from mines.

The courts will hardly indulge the presumption that it was the intention of the legislature to provide against the contingency that the miners of the state would violate a penal statute already in existence.

But if the act was intended to promote the safety of miners, then it is clear that the means employed to that end are wholly unreasonable and arbitrary. How is the safety of miners enhanced by delegating to a state commission the power to determine the amount of impurities allowable in any mine; or by requiring the operator to accept and pay for all coal conforming to the standard so fixed; or by delegating to a commission the power of determining the amount of fine coal which may be produced? These burdensome regulations are so entirely dissociated from any idea of safety and so inappropriate for that purpose, that we cannot believe that the legislature enacted them for that purpose, especially in view of the fact that there was already on the books a statute requiring, under penalty, that all fine coal be removed. Instead of safety, the plain purpose of the statute was the same as that of the Arkansas act, namely, to prevent fraud in the measurement of that upon which the miners' compensation depended.

The mere fact that an act, plainly and primarily intended for one purpose, e. g., to prevent fraud upon the employee, may incidentally and indirectly result in some other benefit, such as safety, does not indicate that safety was the object of the statute, much less does it justify the statute as an exercise of the police power on the ground of safety. Can it be imagined for a moment that the legislature of Ohio or Arkansas would have passed these laws and provided the elaborate machinery of a commission to determine the purity and fineness of the coal for which an operator must pay his miners, for the purpose of reducing the dangers of mining? And if such could be supposed to have been the legislative purpose, could a statute having safety for its object be sustained on that ground, which contained clauses wholly unnecessary and unrelated to the subject of safety, and which at the same time curtail and destroy the right of private contract? If, therefore, this statute is to be sustained, it must be on some other ground than public safety.

The Court also seemed to consider that the act would tend to conserve natural resources by furnishing an incentive to remove fine coal from the mines. Here, too, it is clear that if that was the object of the statute, the burdensome regulations imposed upon the operator sustain no reasonable connection therewith. The conservation of the coal supply is not furthered by delegating to a state commission the power to fix the quality of the coal which may be removed from the mine and for which the operator must pay, or the power to determine the amount of fine coal allowable; nor are the findings and orders of the commission based upon questions of conservation.

Besides, no one can be required to conserve his private property for the public unless he receives due compensation. The Court below cites certain cases which dealt with the conservation of oil and gas; but such minerals are easily distinguished from coal. No surface owner has an absolute ownership of the former until he reduces the same to actual possession; they move about under the surface and have been compared to *ferae naturae*, and also to the waters of a stream which the superior owner of lands may not divert or extravagantly waste, to the detriment of the inferior land owner; but ownership of coal and other minerals *in situ* is absolute. The owner of coal land has as complete a right over his property as the owner of agricultural land. This distinction is recognized and pointed out by this Court in Ohio Oil Company vs. Indiana, 177 U. S., 190, 202, wherein White, J., says:

> "Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed *situs* under a particular portion of the earth's surface within an area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The

waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In Brown vs. Spilman, 155 U. S., 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

'Petroleum gas and oil are substances of a peculiar character, and **decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications.** They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown vs. Vandergrift, 80 Penn. St., 142, 147; Westmoreland Nat. Gas Co.'s Appeal, 25 Weekly Notes of Cases, (Penn.) 103.' "

The Court below cites Hudson Water Co. vs. McCarter, 209 U. S., 349, in which a statute was upheld which prohibited the transportation of water of the state of New Jersey to any other state. This case rests on the same basis as the oil case just referred to. The Court likens the power of the state to control the waters therein to its power to make laws for the preservation of game (p. 356).

Wilmington Star Mining Co. vs. Fulton, 205 U. S., 60, also cited by the Court below, has nothing to do with the conservation of natural resources. The statute there upheld was intended to promote the safety of the miners by requiring that only licensed mine managers and examiners be employed.

While, therefore, there are cases where waste of certain natural resources may be prevented by proper regulation, none of them go to the extent of holding that property capable of private possession and private ownership and actually so held, may be conserved in the interest of the public, without paying full compensation. It needs no argument to show that any restriction upon the use of private property in the interest of the public is *pro tanto* deprivation.

The Court in this connection also referred to a recent amendment to the Ohio constitution permitting the passage of laws for the conservation of natural resources. This amendment was obviously intended merely to give the legislature power (always of course within the limits prescribed by the bill of rights) to pass laws for the conservation of the natural resources of the state. For instance, laws for the preservation of forests may, doubtless, be passed, and state forests may be created, or rights in private forests abridged by the exercise of the right of eminent domain; but nobody would claim for a moment that a private citizen's forest could be taken or his right to cut trees therein limited without compensation. Even if the conservation amendment was intended to abrogate the guaranties of the bill of rights in the Ohio constitution and to permit the taking of private property for the public benefit without compensation, then it is in clear violation of the fourteenth amendment of the constitution of the United States.

II.

THE PENALTIES PRESCRIBED BY THIS ACT ARE SO EXCESSIVE AS TO DEPRIVE THE APPELLANT OF THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 6 makes violations of the act by the operator a misdemeanor, punishable by fines of not less than $300 nor more than $600 for each separate offense. The screening of each and any car of coal in order to determine the compensation to be paid therefor is a **separate offense.** If an operator who is advised that this act violates the constitution of the United States and of Ohio and so believes in good faith,—fails to observe the law, he will be subject to this penalty for each violation, in the event that the act be finally held valid.

It is stated in the bill and must therefore be taken as true for the purposes of this hearing, that the minimum fines would amount to over $800,000.00 for each day's operation of appellant's mine contrary to the act. A judicial determination of the validity or invalidity of this law requires several months, as is evident from the record in this case. The total amount of fines which might be imposed upon the appellant for operating during a period of, say six months, pending this judicial determination, would be upwards of $12,000,000.00, even though the minimum penalty were imposed for each violation. The maximum penalties would exceed $24,000,000.00. The amount which might be imposed upon all of the operators within the state for operating during a like period is so large as to be beyond comprehension.

We, therefore, have here a law, the penalties for the violation of which are so terrifying in their cumulative

severity as to force the operator either to submit to its provisions pending the determination as to its validity, no matter how sincerely he may entertain the opinion that the law deprives him of his constitutional rights; or, on the other hand, to close his mine and suffer incalculable losses, for which he can never hope to be reimbursed, even if the courts finally sustain his claim that the law is invalid.

The effect of a law such as this is to deprive the operator of his day in court. If he violates the law, he may be subject to the excessive penalties to which we have referred. If he complies with it, pending the determination as to its validity, and the law is finally held unconstitutional, he will in the meantime have been deprived of the exercise of the rights guaranteed to him by the constitution. For the deprivation of liberty and property during this period, he will never be made whole. The loss to the operator through having to pay for a product regardless of his market requirements; the loss due to applying the determinations of the commission to every car of coal; the loss due to complying with the orders of the commission relative to the production of fine coal,—all would be irreparable. The constitutional rights here taken away by the enforcement of the law in question are exceedingly valuable and practically indispensable to the successful operation of the mine owner's business. The value to him of the right of fixing the quality of his own product and of contracting freely on that subject with his employees,—of which right the act will deprive him if he submits to it,—is too valuable to be thus lightly taken away by the imposition of penalties so excessive that the operator is forced to surrender.

The value of the right referred to is further emphasized by considering the fact that close competition exists, not only between the operators of this state themselves, but also between them and the operators of other states, such as Pennsylvania, West Virginia and Illinois. Any handicap or burden which is imposed upon the operators in Ohio, and not upon their competitors, will seriously affect the interests of the former.

But this is not the only loss which will fall upon the operator. In order to comply with the law, each operator must make changes in the tipples at the mines. The total expense of making these changes for all of the coal mines in the state would amount to over $1,000,000, as stated in the affidavit of Charles E. Maurer filed in support of the application to this Court for a temporary restraining order. If the operators incur this expense, even though they are correct in their claim that the law is unconstitutional, there will be no means of reimbursing them.

This Court has held that laws which prescribe penalties so excessive as to compel submission to their terms, with all the resulting loss and inconvenience rather than the risk of such penalties, violate the 14th amendment to the constitution, in that they deny the equal protection of the laws.

The law on this point is stated in Ex parte Young, 209 U. S., 123. On p. 146, the Court, quoting from Cotting v. Kansas City Stock Yards Co., 183 U. S., 79, at p. 100 and 102, says:

> "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extrava-

> gant and unreasonable loss? * * * It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In the Young case, a railroad rate act was held unconstitutional on the ground that the penalties were such as to intimidate the railroads into submission rather than risk the penalties. The Court says on p. 148:

> "We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The Young case was followed in Mo. Pac. Ry. vs. Tucker, 230 U. S., 340.

It was suggested in the opinion of the Court below that the operators could violate the act just once in order to have it tested and then comply with its provisions. In view of the considerations we have set forth above, this suggestion has no sound basis. We have shown that the loss and inconvenience, which necessarily results from complying with the law, (e. g., reconstructing tipples, loss in competition, expense of applying the determinations of the commission, etc.) for which the op-

erator cannot be reimbursed, are very great. The value of the constitutional rights taken away by this law, is too great to be thus trifled with. In Ex parte Young, *supra,* it was suggested to the Court that it should not enjoin the enforcement of the act in question there, for the reason that its constitutionality could be tested in a criminal prosecution after a single violation. The Court, on p. 163, disposed of the suggestion in language peculiarly appropriate here:

> "It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and **if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.**"

Without the penalties prescribed in this act, it would be wholly inoperative and would fail in its purpose. Without the penalties the operator could use screens and otherwise violate the act with perfect impunity. It is clear that the court in its equity jurisdiction could not compel compliance with the law, as that would involve a continual supervision and exercise of power over a private business which no court would assume.

If the operator and miner should agree that wages be calculated on a screened coal instead of mine-run

basis, it is clear that the miner could not by civil suit recover wages on a mine-run basis for the reason that there would be no contract in existence, fixing the amount of wages on such basis. Even if there were such contract, and the operator should refuse to calculate compensation on a mine-run basis, the miner would be without remedy in a civil action, because he could not prove the tonnage upon that basis. Further, any civil remedy would be entirely inadequate to the miner to enforce the act, not only because he could not prove the facts necessary to sustain such action, but because the necessary frequency of such actions would deprive him of their value.

We think it clear, therefore, that without the penalties, the operator could do as he chose and the act would utterly fail.

The situation here is entirely different from that of Willcox vs. Gas Co., 212 U. S., 19, 54, and kindred cases, where though the penalties were held void, the acts in general were sustained. In that case, which involved the validity of a statute fixing the price of gas, there were ample civil remedies to enforce compliance with the law, as for example, mandamus, revocation of charter, revocation of franchise, and refusal on the part of customers to pay more than the statutory price. No such remedies, however, exist to insure compliance with the statute in question, and if the penalties are excessive, the whole act is invalid.

Since the penalties here prescribed are vital to the operation and enforcement of the act, and are so excessive as to result in an enormous destruction of property and deprivation of personal rights while a test of constitutionality is being made, we submit that the whole act is thereby vitiated.

III.

THIS ACT IS UNCONSTITUTIONAL UNDER THE CONSTITUTION OF THE STATE OF OHIO.

If the act in question deprives the appellant of liberty and property without due process of law, or denies to it the equal protection of the law in violation of the 14th amendment of the United States constitution, then further discussion is of course unnecessary. But even though it could be held that this act does not violate the constitution of the United States, as interpreted by this Court, still we shall submit that the act is invalid under the constitution of the State of Ohio, as construed by the Supreme Court of that state, which in cases involving questions of state policy this Court has often declared itself bound to follow.

In 1900 there came before the Supreme Court of Ohio the mine-run act of 1898 which was practically identical with the statute of Arkansas passed upon by this Court in the case of McLean vs. Arkansas, supra. The Ohio act of 1898 (93 O. L., 33) provided that:

> "It shall be unlawful for any mine owner, lessee or operator of coal mines in this state, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio."

Like the Arkansas statute it left to the operator complete liberty to reject and refuse to pay for all coal sent to the surface which did not suit him. It was, therefore, a much less drastic law than the one we are considering, which not only forbids the use of a screen and

requires payment on a mine-run basis, but takes away from the mine owner all liberty of rejection or choice as to what he shall pay for and places the decision of these vital matters in the hands of a commission. So far, therefore, as the act of 1898 operates to restrict the right of private contract, it was much less objectionable than the present law. Yet the Supreme Court of Ohio held the act of 1898 invalid as an invasion of the right of private contract, guaranteed by the Ohio constitution.

The Court says of the act (p. 438):

> "Its purpose is to terminate the rights heretofore universally recognized in this state, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the state expressly disclaim any authority in the legislature to determine the price to be paid for mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal, miners have become entitled to receive and operators have become bound to make, compensation having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. * * * It is suggested as the basis of the act, that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to

provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. * * *

This act may be invalid for other reasons, but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make compensation according to the value of the service rendered and received."

As we have said the present law is subject to exactly the same infirmities as those held fatal in the Preston case, and contains, in addition thereto, provisions which constitute still greater invasions of the liberty of contract. It is, therefore, no longer an open question in Ohio that the police power of the state does not extend to the passing of a mine-run law and that such a law deprives both operators and miners of rights of contract guaranteed by the Ohio constitution in its bill of rights. This Court, as well as the other federal courts, is bound by the construction which the highest state court places upon the constitution of that state. Merchants' Bank vs. Pennsylvania, 167 U. S., 461; Haire vs. Rice, 204 U. S., 291, 301; Express Company vs. Ohio, 165 U. S., 194, 219; Oakes vs. Mase, 165 U. S., 363; Debitulia vs. Lehigh Coal Co., 174 Fed. Rep., 886, 888.

The defendants rely on two recent amendments to the Ohio constitution to sustain the law, notwithstanding the Preston decision.

These amendments are sections 34 and 36 of article II, the former of which is as follows:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and

providing for the comfort, health, safety and general welfare of all employees, and no other provision of the constitution shall impair or limit this power."

Section 36 provides that:

"Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been on may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

If in 1900 when the Preston case was decided, a mine-run law less obnoxious to constitutional guaranties than the one under discussion, violated the bill of rights of the Ohio constitution, how can the present law be sustained? It can only be under the assumption that the amendments referred to repeal the bill of rights, at least in respect of the subjects therein mentioned, and that the rights heretofore held sacred thereunder may now be taken away by statute.

Section 34 above quoted is certainly broad enough in its literal terms to authorize the legislature to pass a law by which an employer's property, liberty and even life may be taken, if only such sacrifice be "for the comfort, health, safety and general welfare of all employes." Can it be that by declaring that the legislature may pass laws for the comfort and welfare of employes, and fur-

ther declaring that "no other provision of the constitution shall impair or limit this power," the people of Ohio intended to subordinate the life, liberty and property guaranteed elsewhere to all other classes of ctizens, to the comfort and welfare of one class? Can it be that those fundamental rights to life, liberty and the pursuit of happiness, which have always been held to belong to every man alike and to underlie the entire structure of our government, have been abolished by the people of Ohio so far as they may interfere with laws passed for the benefit of employes? Certainly no court will for a moment indulge such a supposition.

If this provision of Section 34 does not repeal or abolish all the guaranties of the bill of rights in these respects, does it repeal or abolish part of them? If the legislature is still prohibited from passing laws which will take away **all** my property and give it to the class known as employes, is it permitted by this new amendment to take a **part** of it away and give it to that class? If not, then does it not follow that the line beyond which the police power of the state may not go in derogation of the rights of the people to their life, liberty and property, is just where it always was? Does it not follow that the new amendments were not intended to repeal the sacred rights guaranteed under the bill of rights, and were not intended to lessen or weaken them? For if section 34 has any reference at all to these fundamental rights, then it plainly refers to and destroys all of them, for it says that "no other provision of the constitution shall **impair or limit** this power" to legislate for the comfort, health, safety and welfare of employes.

We submit that such a monstrous supposition is not to be entertained.

If it be asked what was the purpose of the amendment, we say that we think it clear that it was merely to declare that, subject to the fundamental rights which are inalienable, the powers therein enumerated were among those granted to the legislature, and that no other provision in the constitution should be held to limit such grant. In other words, the last clause of section 34 was not intended to abrogate or lessen in the slightest degree the protection of such fundamental rights as life, liberty and property, but was merely intended to protect the section against attack for want of granted power.

What we have said of section 34 applies with still greater force to section 36, for the latter section does not contain any clause which purports to make any other part of the constitution subordinate to it. As we have already pointed out in another part of this brief, the clause permitting laws to be passed for the conservation of natural resources must be construed in connection with the bill of rights, and when so construed, merely means that the subject of conservation is among those concerning which laws may be passed, but always with the same regard to the rights to life, liberty and property which have always existed under the constitution of the state.

If, therefore, the former mine-run law in this state violated the rights guaranteed by the Ohio constitution, then the present law is invalid for the same and greater reasons. The present law is subject to the same infirmities as the former and imposes additional burdens upon the operator and makes further invasions of the liberty of contract.

In conclusion, we submit that this Court should hold that the act in question violates both the constitution of the United States and the constitution of Ohio, and that the District Court erred in refusing to grant an interlocutory injunction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 513.

RAIL AND RIVER COAL COMPANY,

APPELLANT,

vs.

WALLACE D. YAPLE, MATTHEW B. HAMMOND AND THOMAS J. DUFFY, AS MEMBERS OF AND CONSTITUTING THE INDUSTRIAL COMMISSION OF OHIO,

APPELLEES.

MOTION OF APPELLEES TO AFFIRM, AND BRIEF OF ARGUMENT IN SUPPORT THEREOF.

MOTION.

Appellees move to affirm the above entitled cause, being use number 513, October Term, 1914, on the ground that is manifest that the questions upon which the decision the case depend are so frivolous as not to need further gument.

TIMOTHY S. HOGAN,
torney General of Ohio, and Attorney for Appellees.
JAMES I. BOULGER,
CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel for Appellees.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION.

Appellant filed its bill in the District Court of the United States for the Northern District of Ohio, Eastern Division, seeking to enjoin the enforcement of an act of the General Assembly of the State of Ohio, hereinafter quoted, entitled, "An Act to regulate the weighing of coal at the mines."

Pursuant to section 266 of the Judicial Code the cause was heard by Honorable John W. Warrington, Circuit Judge, Honorable John E. Sater, District Judge, and Honorable John M. Killits, District Judge, upon the prayer for an interlocutory injunction. The District Court, so constituted, denied the injunction. Its opinion is found in the record at pages 15 to 22 inclusive, and is reported in 214 Federal, 273.

Thereupon, an appeal to this court was perfected pursuant to section 266 of the Judicial Code. Application for a temporary restraining order was made to Mr. Justice Day, and by him refused. Thereupon appellant filed a motion in this court for a temporary restraining order, which was considered on briefs and denied by the court.

That the merits of this case were quite fully presented to this court upon the motion for a temporary restraining order is one of the considerations which have influenced us to file this motion.

As we see it, the questions on which the decision of this cause depended are so frivolous as not to need further argument, within the meaning of the fifth paragraph of Rule 6 of this court, because the main question is settled absolutely by a recent decision of this court, and because

the collateral questions involve principles that are perfectly well established.

The act which appellant assails is twice quoted in the record (pages 12 and 15); but for the convenience of the court we insert it here in full:

"Section 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt or other impurity than that ascertained and determined by the industrial commission of Ohio as hereinafter enacted."

"Section 2. Said industrial commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state."

"Section 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable in the output of any mine said industrial commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said industrial commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said industrial commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been op-

erating while the percentage of fine coal so fixed by said industrial commission has been in force, exceeds the percentage so fixed by it, said industrial commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said industrial commission."

"Section 4. Said industrial commission shall, as to all coal mines in this state, which have not been in operation heretofore, perform the duties imposed upon it by the provisions hereof."

"Section 5. Said industrial commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof."

"Section 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars."

"Section 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt or other impurity, than that ascertained and determined by said industrial commission, as hereinabove provided, shall be guilty of a misdemeaner and upon conviction shall be punished as follows: for the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days, he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of

a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

The foregoing legislation does not stand in need of elaborate analysis. Its primary and controlling purpose is, of course, to compel the operators of coal mines to compensate their employes if paid by weight on the basis of the entire weight of the product mined by them as it is brought to the surface in the mine car. It prohibits the use of the device known as the "screen", which is an appliance used for the purpose of separating what is known as lump coal from what is known as slack and other finer grades, for the purpose of reducing or diminishing the total weight of the contents of the car and basing the compensation of the miner upon such reduced weight. In other words, it effectively prohibits the paying of miners and loaders of coal on what is known as the "screened coal" basis, and enjoins the use of what is known as the "mine-run" basis of compensation.

To this extent the Ohio statute is practically identical with the Arkansas law, considered by this court in McLean v. Arkansas, 211 U. S., 537. The entire statute involved in that case is quoted in the opinion of Mr. Justice DAY at page 543. For our purpose the following extract thereof is sufficient:

"It shall be unlawful for any * * * operator of coal mines * * * employing miners at bushel or ton rates, or other quantity, to pass the out-put of coal mined by said miners over any screen or any other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of wages fixed by the laws of Arkansas; * * * and the coal

> sent to the surface shall be accepted or rejected; and if accepted shall be weighed in accordance with the provisions of this act * * *."

At a glance, it is apparent that in so far as the prohibition of the use of the screen for the purpose of diminishing the weight of the product for which compensation shall be paid, is concerned, and in so far as the compulsory use of the "mine-run" method or basis of compensation of employes, as against any other method based on *weight* or *measure*, is concerned, the Ohio act is the same as the Arkansas law.

In McLean v. Arkansas, *supra*, the constitutionality of the Arkansas law was sustained. We need not quote from the decision of Mr. Justice Day; but as a matter of logic it follows, we think, that the decision itself establishes the rule that as against any of the guarantees of the amendments of the Federal Constitution, a state, exerting its police power, has the right to enact legislation of this sort, and, correspondingly, to restrain the exercise of the individual's liberty of contract.

McLean v. Arkansas has been frequently cited with approval in more recent opinions of this court. (See Williams v. Arkansas, 217 U. S., 87; Engel v. O'Malley, 219 U. S., 138; C. B. & Q. R. R. Co. v. McGuire, 219 U. S., 569; Quong Wing v. Kirkendall, 223 U. S, 62; Schmidinger v. Chicago, 226 U. S., 589; Bayrett v. Indiana, 289 U. S., 29.)

Therefore, we say that the question of the power of the State of Ohio to enact into law a policy of the kind exemplified in the central and principal features of the legislation now under review, is at this time so frivolous as not to need further argument.

But before leaving this point we call the court's attention to the fact that the decision in McLean v. Arkansas was placed by Mr. Justice Day partially upon conditions disclosed in a public inquiry conducted by an industrial commission authorized by act of Congress. (See pages 549 and 550, opinion in McLean v. Arkansas.)

Ohio was not content to rest her legislation upon the results of the official investigation referred to by Mr. Justice Day. Proceeding with the utmost deliberation, the legislative branch of her government directed a similar and independent inquiry into the conditions of coal mining to be made, and enacted the present law in the light of conditions shown by that inquiry, and in accordance with the suggestions made by the commission which conducted the investigation. We refer the court to the report of the Ohio Coal Mining Commission to the Governor of Ohio, copies of which are on file with the clerk.

The main question being shown to be, as we think, frivolous within the contemplation of the court's rule, we pass to such collateral questions as may be involved.

SECTIONS 2 AND 3 OF THE ACT.

Appellant's counsel have always insisted that there are questions, necessary to the decision of this cause, which are not determined by McLean v. Arkansas. Some of these questions are alleged to arise under the constitution of the State of Ohio. All that we care to say with respect to them can be brought within a very small compass and will be postponed to a later portion of this brief.

Of purely federal questions, appellant's counsel claim to have two, which they say are not disposed of by McLean v. Arkansas. They may be stated as follows:

1. Sections 2 and 3 of the Ohio act, imposing upon the Industrial Commission of Ohio, the function of determining the percentage of impurities unavoidable in the proper mining or loading of the contents of mine cars of coal in the several mines of the state, and (in the event of failure of employer and employes to agree) the percentage of fine coal allowable in the output of a coal mine, constitute other and further invasions of the liberty of contract not necessitated by the main policy of the law, and constitute an unwarranted interference with a private business and the right of its proprietors to conduct it as they severally see fit.

2. The penalties imposed upon operators of coal mines by section 6 of the act are so heavy as to intimidate the operators and thus to preclude them from suffering their consequence and thus testing the constitutionality of the act in the Ohio courts.

We entertain the view that both of these alleged questions are so frivolous as not to require further argument.

In making the first of them appellant's counsel have in previous argument pointed out that the Arkansas statute, upheld in McLean v. Arkansas, expressly reserved to the employer the right to accept or reject a car load of coal as it came from the mine, and that in exercising this right the operators would retain to themselves control over the quality of the product of their own mines.

Appellant's counsel then call attention to the admitted fact that under the Ohio law the operators are not at liberty to accept or reject a mine car load of coal because of its failure to conform to quality specifications of their own free choice; but that they must pay their operatives on the basis of all the contents of the mine car unless the

same fails to conform to specifications not of their own choosing but, with respect to the percentage of impurities, those determined by the Industrial Commission, and with respect to the percentage of fine coal, those agreed upon between the operator and his employes; or in the absence of such agreement, those fixed by the Industrial Commission of Ohio.

So, counsel say, the Ohio law differs essentially from the Arkansas law in such a way as to bring the present case out of the controlling effect of McLean v. Arkansas, *supra*, and to make the former unconstitutional.

We discussed these features of the Ohio law somewhat fully in our memorandum opposing the motion for a restraining order, but for the convenience of the court restate our position here.

Our contentions with respect to the provisions of sections 2 and 3 of the Ohio law are as follows:

1. They constitute appropriate and necessary incidents to the main objects of the law.

2. The alleged invasion of the liberty of contract and interference with the right of management of a private business, which they are said to embody, is illusory and cannot be complained of by the appellant and those whom it represents.

We have referred to the report of the Ohio Coal Mining Commission, copies of which are on file. We direct the court's attention to pages 51 to 58 inclusive, of said report, and to the second conclusion of the Commission at page 59. We deem it proper to quote from these pages as follows:

> "The third objection of the operators to the mine-run system is that there would be a great increase in

the amount of impurities mixed with the coal and brought out of the mine under such a system, which would greatly deteriorate the quality of the coal if it were sold on a mine-run basis and which would increase very much the cost of operating the mine if the coal were cleaned before it was sold.

In the minds of the members of this Commission, this is the strongest objection to the adoption of the mine-run system by law in Ohio, unless there can be included in the law ample safeguards for the operators.

* * * * * * * * * *

All parties agree that the place to remove these impurities is in the mine, at the working places. * * * All parties agree that it is not possible to remove all of the impurities in the coal inside of the mine. The smaller particles of dirt have become mixed with the fine coal and could not be removed without a tedious sorting by hand, which it is not practicable to do. Other portions of the dirt adhere to the coal or are found imbedded in the large lumps. If these impurities are of the nature of slate or sulphur bands of considerable size, it is the business of the miner to break the lump in order to remove them. If they are only thin partings, they are left in, for the coal would be depreciated more in value by removing them than by leaving them.

Some of the impurities are hard to detect in the mine with only the faint light shed by the miner's lamp. This is especially true of the inferior grades of coal, which in appearance resemble more or less the other coal. We do not mean to say that any considerable amount of this coal, or other impurities, need escape detection by a careful man who has had some little experience in a coal mine. If any considerable amount of impurities are loaded out it can only have been done intentionally or through carelessness on the part of the miner. It is not, however, practicable, or even possible, to remove all the impurities in the mine."

Thereupon the Commission, as the court will observe, discuss various methods of eliminating impurities from the product brought to the surface. The quotation which we have made is from pages 51 and 52 of the Commission's report. Near the bottom of page 53 is found the following:

> "The miners claim that under a mine-run system of payment, they would clean their coal as well as they now clean it under the screened coal system. They claim that it is always to the interest of the miner to bring out his coal in the best possible condition, and that the trained miner takes a pride in his work and therefore would be unwilling to load dirty coal.
>
> These same arguments were made before the former commission, which sat on this subject, and they did not greatly impress that commission. Neither do they greatly impress the members of this commission. It may be admitted that the majority of miners do endeavor to perform their labor in a workmanlike manner and that they would continue to do so, at least for a time, under a mine-run system of payment."

After reviewing various *a priori* arguments which were made to them, the commission stated the substance of what is characterized as the most reliable testimony heard by them relative to the experience of other states, including Illinois and Arkansas, under the so-called "mine-run" system. Concluding at page 58 they say:

> "Our conclusions are that the adoption of the mine-run system in Ohio would cause a considerable increase in the amount of impurities brought to the surface, unless some way were found to protect the operator from the carelessness or indifference of the miner."

The recommendation of the commission on this point, found at page 59 of their report, is in line with the lan-

guage above quoted. The situation then may be described as follows:

The experience of states like Illinois and Arkansas under the "mine-run" system had been such, as established by testimony taken before the Ohio Commission, as to show conclusively that over-production of impurities was a natural and inevitable result under the "mine-run" system as it existed under laws like those of Arkansas. That is to say, when the miners and operators were left free to contract with respect to a standard of purity, as they had been under the Arkansas law, the practical result had been a product unduly full of impurities. The production of impure coal was deemed to be a public evil, justifying legislation for its removal.

In other words the main legislative policy embodied in the mine-run law, when put into effect, resulted in incidental evils, unless surrounded by safeguards for the avoidance of such evils. The means chosen by the Ohio legislature, adopting recommendations of the Ohio Mining Commission for the obviation of such incidental detriment, are those embodied in sections 1 and 2 of the Ohio law. First, there is a prohibition directed to the laborer against bringing out of the mine a product containing a percentage of impurity higher than a given standard. Second, the standard was to be fixed by the Industrial Commission of Ohio, an administrative agency of the state, in accordance with the rule laid down in the statute itself, viz., the commission should ascertain for each mine the percentage of impurity *unavoidable* in the proper mining of coal.

At this point we must call attention to the fact that the act now before the court is not expressive of the complete legislation of Ohio applicable to the subject matter.

The Industrial Commission's order or determination is not final, but as held by the lower court, either party may petition for, and obtain, a hearing before the commission, and may thereafter have a speedy review of its action by the Supreme Court of the state. The statutes disclosing this are found in 103 Ohio Laws, page 95, and may be quoted in abstract as follows:

"Section 25. All orders of the industrial commission of Ohio in conformity with law shall be prima facie reasonable and lawful; and all such orders shall be valid and in force and prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose pursuant to the provisions of section 41 of this act, or until altered or revoked by the commission."

"Section 27. (1) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness and lawfulness of any order of the commission in the manner provided in this act.

* * * * * * * * * *

"(3) Upon receipt of such petition, if the issues raised in such petition have theretofore been adequately considered, the commission shall determine the same by confirming, without hearing, its previous determination, or if such hearing is necessary to determine the issues raised, the commission shall order a hearing thereon and consider and determine the matter or matters in question at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the petitioner and to such other persons as the commission may find directly interested in such decision."

"(4) Upon such investigation if it shall be found that the order complained of is unlawful or unreasonable the commission shall substitute therefor such order as shall be lawful and reasonable."

"Section 38. Any employer or other person in interest being dissatisfied with any order of the com-

mission may commence an action in the supreme court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the supreme court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. * * *

"Section 39. (1) If upon the trial of such action it shall appear that all issues arising in such action have not theretofore been presented to the commission in the petition filed as provided in section 27 of this act, or that the commission has not theretofore had ample opportunity to hear and determine any of the issues raised in said act, or has for any reason not in fact heard or determined the issues raised, the court shall, before proceeding to render judgment, unless the parties to such action stipulated to the contrary, transmit to the commission a full statement of such issues not adequately considered and shall stay further proceedings in such action for fifteen days from the date of such transmission and may thereafter grant such further stay as may be necessary."

In this same connection we refer to section 2 of Article IV of the Ohio Constitution, which, without quoting it, we may assure the court authorizes legislation such as that above quoted, providing for a direct appeal from the decision of an administrative body to the Supreme Court of the state.

In this manner the legislature of Ohio has effectually safeguarded its legislation against incidental evils such as experience has shown flow from the operation of a law like that of Arkansas. The law of Arkansas prohibits the screening of coal before it is weighed, and requires acceptance or rejection before weighing; consequently it places upon the operator the unsatisfactory burden of accepting or rejecting the coal in the mine car. Either the

perator will reject cars upon a seemingly arbitrary basis nd thus engender disputes with his employes or he will ccept all the coal and thus deteriorate his product.

The Ohio statute, on the other hand, does not prohibit ne screening of the coal before it is weighed, but on the ontrary clearly implies that the quality of the coal shall e definitely ascertained before the basis of compensation fixed. We see, therefore, why it is that the type of mine-run law" exemplified in the Arkansas statute re-ults practically in an over-production of impurities and hy also the differences between the Ohio law and the Ar-ansas law constituting as they do intended safeguards gainst the existence of such evils, must necessarily be ffectual as such.

As to section 3 we may say that although the Ohio Coal lining Commission deals with the problem of over-pro-uction of fine coal in other portions of its report, not ereinbefore quoted, and although the provision respect-ng fine coal differs slightly from that respecting over-roduction of impurities, the same general principles ap-ly. That is to say, a "mine-run law" of the kind exem-lified in the Arkansas legislation operates practically so s to result in the production of an undue proportion of ne coal which is an inferior commercial product and de-reases the value of the whole product of the mine. The vidence supporting this conclusion and the reasons why is true are both set forth in the report of the commis-ion. That being the case another evil incidental to the peration of a "mine-run law" is encountered, and is at-empted to be safeguarded in substantially the same way s with respect to the evil of the over-production of impur-ies.

The first point which we make in this connection, as above stated, may then be reduced to two propositions which may be stated thus:

(a) Conditions resulting in the general production of impurities deleterious to the quality and value of a commodity of general use constitute public evils, which a state, in the exercise of its police power may remedy by appropriate measures.

(b) Where a state law aimed at one public evil, and valid as a measure designed to cope with that evil, will result in other evils of a different character which also constitute in and of themselves proper objects of the exercise of its police power, such state has the right to provide against such incidental evils by additional requirements safeguarding against their existence, and such right exists as an incident to the power to enact the main law.

(a) We need not cite numerous authorities upon the point that a state in the exercise of its police power may directly or indirectly fix standards of purity as well as standards of quantity, subject to which commodities of general consumption must be sold.

> Freund on Police Power, section 32;
> Schmidinger v. Chicago, 226 U. S., 587.

True, the Ohio law does not fix a standard for the *sale* of coal as a commodity. But the difference in principle between the production of the public from frauds by means of a regulation effective only when the commodity is sold or offered for sale, and that protection which would be offered to the public by regulations affecting the quality of a product at the source of its production, is not essen-

tial. If there is a difference it bears upon the evil to be remedied and not the method by which the evil is attacked. That is to say, the laws governing the standard of purity of commodities directly, as subjects of sale and consumption, aim only to protect the public from the consequence of fraud and imposition; whereas laws regulating the standard of production as such have the same effect, and in addition may obviate other public evils clearly subject to the police power. So, it appears from the report of the Ohio Coal Mining Commission that the incidental production of an undue amount of impurities and an unwarranted proportion of fine coal under a mine-run system of compensating workmen, is a source of dissatisfaction, discontent and fraud as between employers and employes. The main law being justified partially on the ground of its tendency to promote harmonious relations of capital and labor (McLean v. Arkansas, supra, p. 550), these ancillary features which provide a method of avoiding such disputes which may possibly arise under the mine-run system itself are also to be justified on the same ground.

There being, then, at least two public evils arising out of the lack of a standard of purity and fineness in the production of coal under a mine-run system, viz., the quality of the product from the standpoint of the public as consumers, and the likelihood that the absence of a standard will engender industrial warfare by becoming a prolific cause of dispute between the employers and employes, the exercise of the police power in the familiar manner, by fixing such standards, is fully sustained.

(b) The principle here is merely the well established one of implied or incidental power. If the police power of

the state extends generally to a subject matter, as in this case, it extends to regulating the method of weighing coal at the mines as a basis for the compensation of employes, there exists as incidental to this power, the additional power to provide safeguards against corollary evils; and in exercising such incidental power the legislature may, to the extent necessary, interfere with the conduct of a private business.

> Interstate Commerce Commission v. Goodrich Transportation Co., 224 U. S., 192;
> Flint v. Stone Tracy Co., 220 U. S., 107.

2. The alleged deprivation of the liberty of contract, which sections 2 and 3 of the Ohio law are said to work, is illusory. It is a well settled rule of this court that one who claims the protection of the federal constitution, as against a state law, must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the federal constitution.

> Plymouth Coal Co. v. Pennsylvania, 232 U. S., 532 and cases cited by Mr. Justice PITNEY at page 545.

In this case the *employers*, represented by appellant, claim that the act is unconstitutional because it precludes the fixing of standards of rejection, or standards of quality by private contract. This is, of course, not strictly true with respect to the percentage of fine coal which the law expressly makes subject to agreement. (Section 3). We point out, however, that the contention must fail as to the operators for the reason that there is committed to the Industrial Commission, under the law, the function of ascertaining the *unavoidable* percentage of impurity for

a given mine and the *allowable* percentage of fine coal. Whatever determination the Industrial Commission may make in the premises is subject to review, and it is at least true that the statutory proceedings are characterized by due process of law. The commission cannot fix an arbitrary standard, but must fix one conformable to the law itself. The law itself does not fix an arbitrary standard, but as the court below well said, "the operator, if given the unrestricted right of contract, could do no more" than the law requires the Industrial Commission to do for him.

Therefore, we repeat that as to the operators the alleged deprivation of liberty of contract growing out of the provisions of sections 2 and 3 of the Ohio law is illusory and had no real existence. Of course on principles established by decisions already cited the operators cannot complain of any disadvantages which may exist from the standpoint of the employes.

PENALTIES.

We submit that in the light of decisions like Flint v. Stone Tracy Co., *supra*., Willcox v. Consolidated Gas Co., 212 U. S., 19, Grand Trunk Ry. Co. v. Michigan Railroad Commission, 231 U. S., 457 and the Ohio Tax Cases, 232 U. S., 576, the point which appellant's counsel make respecting the alleged unconstitutionality of the penalty sections is not involved in the case at bar, and is therefore frivolous within the meaning of the court's rule. However, we may step aside to remark that a minimum penalty of $300 for each separate offense is not an excessive one solely by reason of the fact that one day's violation of the law by appellant would subject it to pen-

alties aggregating $800,000. If the fine were $50 instead of $300 the aggregate would still be in excess of $130,000 for a single day's violation on the part of the appellant. That is to say, the fact that the total is so large results solely from the number of men employed by appellant; and the total would still remain large, even though the fine for each separate offense were reduced to a negligible minimum. The court below, while holding that the question was not in the case, was of opinion that the penalties were not excessive.

We might add to what we have said respecting purely federal questions that Plymouth Coal Company v. Pa., *supra*, is definite authority upon the point that the delegation of the determination of questions of the character mentioned in sections 2 and 3 of the Ohio law in the first instance by an administrative tribunal, and with respect to each mine to itself, is not violative of the amendments to the federal constitution.

THE OHIO CONSTITUTION.

Appellant in its bill complains of the Ohio act that it violates the constitution of Ohio in several respects. One of these complaints is the familiar one respecting alleged delegation of legislative power. It is scarcely necessary for us to notice this contention in view of the explicit rule of action laid down by the law itself for the guidance of the Industrial Commission, and in view of the multitude of authorities available on the question, some of which are cited by Mr. Justice PITNEY in his opinion in Plymouth Coal Co. v. Pa., supra.

In fact, we submit that the very fact that the orders of the Industrial Commission of Ohio are subject to review

by the Supreme Court of the state of itself disposes of the thought that the power which is committed to that commission is legislative. If the commission can make law then the court would be bound by its orders.

Another, and the only other point made under the Ohio constitution which we deem necessary to mention in this brief involves the whole act. It is asserted that because of the decision of the Ohio Supreme Court in the case of In re Preston, 63 O. S., 428, the present law must be regarded as violative of the constitution of Ohio.

There are differences between the statute passed upon in the Preston case and the one involved in the instant case which might form the basis of an interesting study, but we think that the Preston case can no longer be regarded as stating the law of Ohio, because since its rendition the constitution of the state has been materially amended. We call attention to sections 34 and 36 of Article II of the Ohio Constitution, as adopted November, 1912, and effective January 1st, 1913, prior to the enactment of the law involved in this case. These sections are partially quoted in the opinion of the court below but for convenience we quote them here.

> "Section 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health and general welfare of all employes; and no other provision of the constitution shall impair or limit this power."
>
> "Section 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

It is, of course, obvious, as the District Court held, that the act complained of in the case at bar must have been

passed in the exercise of the special powers conferred upon the legislative department by these sections.

For other points raised by appellant under the Ohio constitution we refer this court to the opinion of the District Court.

We submit that all questions raised under the Ohio constitution and necessary to the determination of this case are so frivolous as not to require further argument.

CONCLUSION.

We think we are justified in asking the court to affirm this case without further argument,

First, because the Ohio law, the constitutionality of which is in issue, has for its main purpose the same object, and for its principal effect, the same result, as the Arkansas statute upheld by this court in McLean v. Arkansas, supra.

Second, because the requirement that the unavoidable percentage of impurities and the allowable percentage of fine coal in the proper mining of coal in the several mines in the state be ascertained and determined by the Industrial Commission of Ohio, subject to direct judicial review, for the purpose of fixing a standard of rejection and a basis of "docking" (section 7 of the act) has such an obvious relation to the principal purpose of the act as that the power to enact the remainder of the act will include, as incidental, that to pass these sections themselves.

Third, because the method of the state's exercise of its police power in the delegation of these functions to the Industrial Commission does not involve any real depriva-

tion of the constitutionally guaranteed rights of the operators.

Fourth, because the claim of appellant, based upon the amount of the penalty is negatived by numerous decisions of this court; and, last, because the points made by appellant under the constitution of Ohio are manifestly of no weight.

Therefore, we respectfully ask the court to grant the prayer of our motion, and in any event to order this case transferred for hearing to the summary docket, as authorized by paragraph sixth of the sixth rule.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General of Ohio, and Attorney for Appellees.

JAMES I. BOULGER,
CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel for Appellees.

NOTICE OF MOTION, ACKNOWLEDGMENT OF SERVICE OF SAME, AND COPY OF BRIEF.

SUPREME COURT OF THE UNITED STATES.

October Term 1914.

Rail and River Coal Company, Appellant, vs. Wallace D. Yaple, Matthew B. Hammond, and Thomas J. Duffy, as members of and constituting the Industrial Commission of Ohio, Appellees. No. 513.

September 17th, 1914.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, Attorneys at Law, Western Reserve Building, Cleveland, Ohio.:

Gentlemen: You are hereby notified that a motion, and a brief, copies of both of which are enclosed herewith, will be filed in the Supreme Court of the United States, and that said motion will be submitted to said court on Monday, October 12th, 1914.

This letter is sent to you in duplicate, and we ask you kindly to acknowledge service upon the blank, and return one of the copies for our use under the rule.

Yours very truly,

TIMOTHY S. HOGAN.

Attorney General of Ohio, and Attorney for Appellees.

JAMES I. BOULGER,
CLARENCE D. LAYLIN,
ROBERT M. MORGAN,
Of Counsel for Appellees.

Service of the above notice, and a copy of the brief of appellees on the motion to affirm in the above entitled case is acknowledged this eighteenth day of September, 1914.

HOYT, DUSTIN, KELLEY McKEEHAN & ANDREWS,
Attorneys for Appellants.

A. C. DUSTIN,
Of Counsel.

No. 513

[redacted].

FILED
OCT 10 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1914.

RAIL & RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, et al.,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

No. 1104.

In the Supreme Court of the United States

October Term, 1914.

RAIL & RIVER COAL COMPANY,
Appellant,

vs.

WALLACE D. YAPLE, et al.,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM.

This suit was begun in the court below by the filing of a bill to restrain the members of the industrial commission of Ohio from putting into effect the so-called Mine Run Law, which is printed on pages 12 to 15 of the record in this case. The appellant's application for an interlocutory injunction having been denied, an appeal was taken directly to this court under Section 238 of the Judicial Code. The appellees now move to affirm the holding of the lower court on the ground that the questions on which the decision of the cause depends in this court are so "frivolous as not to need further argument."

If the appellees believe the appeal to this court to be frivolous, it is strange that an earlier discovery of that fact was not made. After the appeal was perfected to this court, an application was made herein in June, 1914, for a temporary restraining order, pending the hearing on the appeal, which was denied by this court, but no

point was made at that time (evidently the discovery had not been made) that the appeal was without merit. On the contrary, appellees' counsel devoted many pages of their printed brief arguing against the granting of such restraining order.

The decision of this motion does not depend upon the merits of the appellant's case, as they may be ultimately found upon final hearing. It may be that upon full and final argument this court may be convinced that the lower court was right. This motion, as we understand it, simply presents the question that this appeal is frivolous and without merit and that there is no question before this court, calling for an investigation and decision on the law.

It is to be noted that the questions involved in this appeal are solely questions of law with respect to the constitutionality of a statute of the State of Ohio. The bill filed below charges that the statute in question deprives plaintiff and others similarly situated of liberty and property without due process of law and denies to them the equal protection of the laws, which rights are guaranteed by Section 1 of Article Fourteen in amendment to the Constitution of the United States and by the Bill of Rights of the Constitution of Ohio. The bill sets forth the respects in which this statute deprives the plaintiff of its constitutional rights, and the decision of the lower court was upon the facts and allegations of this bill. The questions of law upon which the appellant claims the right to a full hearing before this Court are exactly the same as those presented and argued to the lower court, and an examination of the opinion of the lower court will indicate the importance and gravity of certain of those questions.

Evidently the district court were not of the opinion that the questions upon which their decision depended were frivolous and not worthy of argument before a court. The district court was composed of Judges Warrington, Killits and Sater, in accordance with the provisions of Section 266 of the Judicial Code. The argument was made on April 27, 1914, and the court had the case under advisement for more than three weeks, the opinion having been filed on May 20, 1914. The opinion comprises seven printed pages in the record, pages 15 to 22. Although we disagree with the conclusions reached by that court, the discussion in the opinion clearly shows that there are serious questions involved upon which the constitutionality of this statute depends. Had the claims on the part of plaintiff lacked any substantial merit and had they been frivolous, the court below would have disposed of the case upon the plaintiff's own argument and without the preparation of a detailed opinion.

Neither in the brief filed by the defendants' counsel in the district court nor in the oral argument was there ever the slightest indication of any claim that the plaintiff was abusing judicial process or occupying the time of the court with questions not worthy of argument, or with questions too frivolous to be called to the court's attention.

The appellees, to support their new claim that this appeal is frivolous, present a brief which, instead of tending to show in the slightest degree that the appeal is without merit, is taken up with a discussion of the merits themselves, thus indicating that there are arguable issues involved in the appeal. In fact, their brief covers twenty-one large typewritten pages, and is ap

parently an endeavor to convince the court that the Mine Run Law is constitutional.

We will not trespass upon the time of the court by following appellees' brief in support of this motion to the effect that the court below decided the question correctly. Such an argument is of necessity upon the merits. It is enough to point out that there are questions here for discussion and decision.

The Mine Run Law which the appellant claims is unconstitutional regulates to some extent the coal industry of the State of Ohio. It provides in the first instance that every miner of coal, who is to be paid on the basis of weight, shall be paid for such mining according to the total weight of the coal contained within the mine car in which the coal is removed from the mine. The operator is prohibited from screening the coal to ascertain the amount to be paid such miner. A violation of this prohibition is made a misdemeanor punishable by a fine of not less than $300 nor more than $600 for each separate offense.

In addition to these provisions, there are added others which regulate the relations of the operators and their employees and the business of mining in general, as follows:

1. The industrial commission of Ohio is required to ascertain and determine the percentage of slate, dirt or other impurities, "unavoidable in the proper mining or loading of the contents of mine cars of coal" in the various mines of the state. The operator must accept every car of coal sent up by the miner or loader which conforms to the standard of product so fixed by the commission, and he must pay the miner or loader for the labor thereon on a mine-run basis.

It is made the duty of the miner and loader to mine and load coal conforming to or not falling below such standard. Mining or loading coal containing a greater percentage of impurity than that so fixed is made a misdemeanor punishable by fines varying from fifty cents for the first offense to a maximum of $4.00 for the third offense if committed within three days from the first.

2. It is made the duty of the operators and the miners to agree upon the percentage of fine coal allowable in the output of the mine. If no such agreement is made, the commission is required, upon the request of either party, to fix such "allowable percentage of fine coal", which shall continue in force until otherwise agreed by the operators and employees.

3. Whenever the commission finds that the total output of fine coal for a period of a month exceeds the percentage which has been fixed by it, the commission is required to make and enforce such orders "relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by such industrial commission."

The appellees have shown no reason why the appellant should be deprived of a full hearing before this court in which we should have the opportunity to point out the necessary effect upon the coal mining industry of the provisions and regulatory features of the Mine Run Law to which we have referred; the extent to which these provisions regulate the relations of master and servant; the extent to which they regulate the private business of the coal operators; the vast damage and inconvenience which the enforcement of the act entails, and other respects in which the act operates to take away the constitutionally guaranteed rights of owners of coal mines

in this state and the employers of labor in connection therewith.

The coal mines affected by this law represent an investment of millions of dollars. The total tonnage of coal produced by these mines amounted in 1913 to upwards of 36,000,000 tons. Next to agriculture, the coal industry is the leading development of the natural resources of the state. In addition to this, the welfare of all the employees at the coal mines, who number upwards of 48,000, is directly affected by this act.

The serious manner in which the Mine Run Law affects the coal industry of the state is shown by the present idle condition of the Ohio mines. It is stated in the affidavit of Charles E. Maurer, filed in this court in support of the application for a temporary restraining order, that the failure of the operators and miners to agree upon a wage scale in April this year was due to the enactment of this statute. The loss to operators and employees in profits and wages, respectively, since April, already reaches an enormous total.

We do not think that the attempt on the part of our opponents to deprive us of a full hearing on the merits of such a serious and important case should be looked upon with favor by this Court.

It is asserted by the appellees that a prior decision of this court is controlling upon this appeal and makes further argument thereupon unnecessary. The case relied upon is McLean vs. Arkansas, 211 U. S., 537, where the Arkansas Mine Run Law was sustained; but the character, scope, operation and effect of the Ohio law are vastly and fundamentally different from those of the Arkansas act. The Arkansas act contained none of the regulatory features provided for by the Ohio act, except

that the operator who paid by weight was required to pay on a mine-run basis. There was no attempt, in the Arkansas act, to require the operator to pay for any coal which he did not want mined; there was no delegation to a commission of the power to fix the quality of the product of his mine; there was no attempt to regulate the relations of master and servant further than the necessities of the mine-run system required; the power of the operator to agree with his employee as to the quality of coal to be produced was not taken away; no commission was vested with power to issue orders relative to the production of coal at his mine. As the court points out in the opinion in that case, in all respects other than the requirement of payment on the mine-run basis, the operator was left free to conduct his business as he chose without dictation or hindrance from any one and without regulation of any kind whatsoever.

In addition to the questions which we have above briefly referred to, upon which we claim the appellees have shown no reason why we should be denied a full hearing, there are others involving the construction of certain provisions of the Constitution of Ohio. Some of these provisions are in the form of amendments which went into effect in January, 1913. Their full scope and effect, and their application to statutes such as the one in question, have never been passed upon by any court. There is no foundation whatsoever for the appellees' claim that the questions we raise under these amendments are frivolous or that we are foreclosed from raising the same by prior decisions of this court. We claim that the lower court misconstrued these provisions and misconceived their purposes, and we desire a full hearing before this court to discuss these questions in a manner deserving of their importance.

Furthermore, the effect upon the validity of the Mine Run Law of the penalties therein provided to be imposed upon the operators for the violations of the act raises questions which, in our opinion, were not considered fully by the lower court. Upon these questions also further argument is necessary.

In view of the foregoing considerations, we submit that the rule of this court, which the appellees attempt to invoke, has no application to this case, where the questions are numerous, of great importance and of novel impression. The case is clearly not within the rule of Swope vs. Leffingwell, 105 U. S., 3, where the court granted a motion to affirm on the ground that the sole question involved had been squarely decided in a former case.

If the appeal taken in the case at bar were frivolous, it would follow that counsel for the appellant should have known that fact, and that their motive must have been other than that of obtaining, in good faith, a final judicial determination of the appellant's rights under the Constitutions of the United States and the State of Ohio. The brief of appellees, however, does not intimate or indicate that the appellant filed its appeal for the purposes of delay or any improper motive whatsoever.

Certainly the appellant has been prompt in seeking to obtain a final determination upon the validity of the statute in question. Upon the expiration on April 1, 1914, of the existing contracts of employment between the operators and the coal miners, the appellant within a few days filed its bill in the lower court, and at the same time applied for an interlocutory injunction, a hearing upon the same being had on April 27th. The order overruling the application was entered May 23, 1914.

and within five days thereafter an appeal was taken to this court. In view of the dormant condition of the coal mines, it was imperative upon the operators to be prompt in seeking their remedy. The good faith of the appellant in presenting its claims under the Constitutions of the United States and of Ohio to the court below and to this court, and its freedom from delay, or other improper motive, cannot be doubted. It is not seeking, for sinister reasons of its own, to call the attention of this court to questions not worthy of being presented to a tribunal of justice. The case is, therefore, not within the rule of Micas vs. Williams, 104 U. S., 556; Blythe vs. Hinckley, 180 U. S., 333, and Chanute City vs. Trader, 132 U. S., 210, where motions to affirm were granted either on the ground that the questions presented were so obviously frivolous as not to merit the court's further attention, or on the ground that it appeared that the appeal or writ of error was prosecuted for the purposes of delay.

We, therefore, respectfully submit that the appellant should be granted a full hearing in respect of its constitutional rights and that the motion of appellees should be overruled.

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